The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Brunswick Corporation and Brownell & Company Inc.
File: B-225784.2, B-225784.3
Date: July 22, 1987

DIGEST

1. Firm is not an interested party to protest award to competitor for largest award under multiple award solicitation where if protest were sustained another offeror and not the protester would be in line for that award.

2. Questions concerning a firm's legal status pertain to matters of responsibility. General Accounting Office will not review contracting officer's affirmative responsibility determination concerning firm's eligibility for award as "a separate legal entity" where there has been no showing of fraud or bad faith on the part of procuring officials and the solicitation does not contain definitive responsibility criteria.

3. Protest that amendment unfairly benefited incumbent contractor and discriminated against first time offerors such as the protester, is untimely where filed after the closing date established by the amendment.

4. Protest against solicitation provisions filed after the closing date for receipt of proposals is untimely.

DECISION

Brunswick Corporation and Brownell & Company Inc. protest awards made under request for proposals (RFP) No. DAAK01-87-R-A030 issued by the Army for camouflage screen systems. We dismiss the protests.

The camouflage screens are a requirement under the Army's mobilization base planning program. The RFP contemplated a requirements type contract for an initial 3-year base period and two 1-year option periods. Offerors were required to submit unit prices for three Best Estimated Quantities (BEQ) of 20,000, 30,000 and 40,000 camouflage screen systems. Offerors also submitted prices for units ordered in excess of the aggregate BEQ amount of 270,000 units for the 3-year contract base period and for two 1-year option periods which were not evaluated for award purposes.

Four offerors, including the two protesters, Brunswick and Brownell, as well as two other firms, Teledyne Brown Engineering and Devils Lake Sioux Manufacturing Corporation, submitted offers. Their prices per unit are as follows:

	20,000 BEQ	30,000 BEQ	40,000 BEQ	Price for units ordered in access of the aggregate BEQ amount
Teledyne	$415.39	$373.26	$343.19	$316.00
Brunswick	345.08	328.80	319.35	257.18
Devils Lake	346.30	330.86	320.38	304.71
Brownell	407.85	404.73	401.81	394.50

The Army contemplated three awards on the basis of the three BEQs for which offerors submitted unit prices. The solicitation advised offerors that "awards will be made to those offerors whose technical proposals have been determined acceptable, and whose prices in combination with other offers provides to the government the lowest overall price for the aggregate BEQ."

All four offerors were determined acceptable. Based on the above award scheme, Teledyne received the award for the 40,000 BEQ, Brunswick was awarded the 30,000 BEQ and Devils Lake received the 20,000 BEQ award.

We will consider each firm's protest separately.

BRUNSWICK'S PROTEST

Brunswick protests the 40,000 BEQ award to Teledyne. Brunswick argues that Teledyne, in violation of certain solicitation provisions, engaged in "pricing gamesmanship" by proposing "unattractively high prices for the less desirable 20,000 and 30,000 BEQ award," thereby improving its chances of receiving the 40,000 BEQ award.

The Army argues that Brunswick is not an interested party to protest the 40,000 BEQ award to Teledyne. The Army explains that even if Teledyne's offer were rejected, Devils Lake would qualify for the 40,000 BEQ award and Brunswick's award for the 30,000 BEQ would remain unchanged.

Brunswick responds that it is an interested party to protest the 40,000 BEQ award to Teledyne. Brunswick maintains that it meets the definition of an interested party as set forth in the Competition in Contracting Act of 1984 (CICA) 31 U.S.C. § 3551 (Supp. III 1985). CICA defines an interested party as an actual or prospective bidder or

offeror whose direct economic interest is affected by the award of a contract or the failure to award a contract. Brunswick argues that it satisfies this definition because it is an actual offeror for this procurement and as a subcontractor to Devils Lake, Brunswick stands to gain increased revenues if the 40,000 BEQ award is made to Devils Lake, even if the 30,000 BEQ award to Brunswick remains unchanged. In this regard, Brunswick points out that it has an agreement with Devils Lake to supply the firm with color coated cloth for the camouflage screen systems.

Under CICA and our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1986), a party must be "interested" in order to have its protest considered by our Office. Determining whether a party is sufficiently interested involves consideration of a party's status in relation to a procurement. Where there are intermediate parties that have a greater interest than the protester, we generally consider the protester to be too remote to establish interest within the meaning of our Bid Protest Regulations. See Automated Services, Inc., B-221906, May 19, 1986, 86-1 CPD ¶ 470; Eason & Smith Enterprises, Inc.--Request for Reconsideration, B-222279.2, Apr. 18, 1986, 86-1 CPD ¶ 386. A party will not be deemed interested where it would not be in line for the protested award even if its protest were sustained. Gentex Corp., B-225669, Feb. 27, 1987, 87-1 CPD ¶ 230; Automated Services, Inc., B-221906, supra.

Here, the Army reports that even if Teledyne's offer were disqualified, Devils Lake, not Brunswick, would qualify for the 40,000 BEQ. Brunswick does not refute this; instead it argues that as a subcontractor to Devils Lake, its economic interest would be directly affected if Devils Lake receives the 40,000 BEQ award. Where, as here, Brunswick's award of the 30,000 BEQ would not be affected if its protest that Teledyne's offer should be rejected were sustained and where there is a party of greater interest (Devils Lake) to protest, we find Brunswick too remote to establish interest.1/

1/ We note that in postconference comments which Devils Lake submitted as an interested party to the Brunswick and Brownell protests, Devils Lake states that regardless of Brunswick's standing as an interested party, we should consider Brunswick's protest against the award to Teledyne because Devils Lake "joins" Brunswick's protest. While Devils Lake, and not Brunswick would have been the proper interested party to protest the Teledyne award, Devils Lake did not protest this matter. See Taurio Corp.--Reconsideration, B-219008.3, Aug. 12, 1985, 85-2 CPD ¶ 158. Devils Lake merely advised our Office by letter of May 14,

Regarding Brunswick's argument that it is a subcontractor to Devils Lake, our Office will not consider protests from a firm in its capacity as a subcontractor, except where the subcontract is by or for the government. 4 C.F.R. § 21.3(f)(10). Polycon Corp., 64 Comp. Gen. 523, 85-1 CPD ¶ 567. This solicitation does not involve subcontracts by or for the government.

Brunswick also argues that it should be considered an interested party to protest the Teledyne award because it is possible that if Teledyne were disqualified, the Army would resolicit the entire requirement. We find this possibility too remote to find Brunswick an interested party to challenge the Teledyne award. Even if Teledyne were disqualified, since there are three other offerors which are eligible for award of the three BEQ amounts and Brunswick has not challenged the acceptability of any of these offerors, we have no reason to believe that Brunswick would be in line for award if its protest were sustained. See Nortex Corp., B-224930, Jan. 6, 1987, 87-1 CPD ¶ 12; Automated Services Inc., B-221906, supra.

Finally, while conceding that if Teledyne's offer were rejected, Devils Lake, not Brunswick, would be in line for the 40,000 BEQ award, Brunswick argues that it is an interested party because if Teledyne violated certain RFP pricing provisions, as it alleges Teledyne did, it would have received the larger award.

This contention is different from those asserted in Brunswick's initial protest in which it explained why it had standing to protest the Teledyne award. Under the circumstances here, if Brunswick's allegations against Teledyne's pricing were correct, Teledyne's offer would have been rejected and the awards would be reallocated to the three remaining acceptable offerors. However, as discussed above, Brunswick 30,000 BEQ award would not be affected if the awards were reallocated. Therefore, it is pure speculation on Brunswick's part that it would be in line for the 40,000 BEQ award under any circumstances and we find

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1987, that it wanted to be considered an interested party to the Brunswick and Brownell protests which were filed here several weeks prior to Devils Lake's May 14, letter. To the extent Devils Lake is attempting in postconference comments to now protest the Teledyne award by stating that it has "joined" Brunswick's protest, Devils Lakes' protest is untimely and not for consideration on the merits. 4 C.F.R. § 21.2(a)(2) (1986).

such speculation too remote to establish the firm's interest.

Brunswick's protest is dismissed.

BROWNELL PROTEST

Brownell protests that Brunswick which received the 30,000 BEQ award and Devils Lake which received the 20,000 BEQ award are not separate legal entities as required by the solicitation. While Brownell concedes that Brunswick and Devils Lake are separate corporate entities, the protester argues that being "separately incorporated" does not satisfy the true meaning of the solicitation requirement that the firms be separate legal entities because the purpose of the requirement is "to prevent unfair manipulation of contract awards by offerors working in tandem." In this regard, Brownell points out that Brunswick owns 49 percent of Devils Lake and that Brunswick employees are employed by Devils Lake in key management positions. Further, as shown above, Brunswick's and Devils Lake's unit prices are within a few dollars of each other. Based on these factors, Brownell maintains that these two firms, representing 50 percent of the competition "at a minimum were aware of each other's prices and at worst agreed to coordinate their prices to insure maximum award opportunities."

Brownell also argues that the Army, in awarding to Devils Lake, improperly relied on the Small Business Administration (SBA) size determination that Devils Lake is a small business and that its status as a small business is not affected by the management consulting agreement between Devils Lake and Brunswick, a large business concern.

The Army reports that it has an annual requirement for the camouflage screens and that since 1973, Brunswick, a large business and Devils Lake, an 8(a) contractor, have been suppliers of the screens. However, in 1986, when Devil's Lake's eligibility to participate in the 8(a) program ended, the Army, prior to the issuance of this solicitation, requested that SBA address the issue whether Devils Lake could function independently as a "separate entity after its formal relationship as an 8(a) contractor with SBA ended." Also, since there is a management consulting agreement between Brunswick and Devils Lake, the Army requested a size status determination on Devils Lake and a determination on Devils Lake's status as a manufacturer under the Walsh-Healey Act. The Army states that it relied on the SBA determination in determining that Brunswick and Devils Lake are separate legal entities.

Concerning Brownell's allegation that these firms were aware of each other's prices or prepared their offers together, the Army states that it has been unable to find any evidence that these firms engaged in collusive bidding practices. In this regard, both Brunswick and Devils Lake state that they prepared their offers without knowledge of the other firm's offer and were not aware of each others prices.

The solicitation provides that the government "intends to make three awards to geographically and legally separate suppliers of the camouflage screen systems." The RFP does not impose any specific standard to determine whether or not the firms awarded the contracts are separate legal entities. Questions concerning a firm's legal status are considered matters of responsibility, not responsiveness as suggested by the protester.2/ See, e.g., Delaney, Siegel, Zorn & Associates, Inc., B-224578, Dec. 23, 1986, 86-2 CPD ¶ 708; Aleman Food Service, Inc., B-223959, Aug. 28, 1986, 86-2 CPD ¶ 238; United Hatters, Cap and Millinery Workers International Union, B-177512, June 7, 1974, 74-1 CPD ¶ 310. See also Security America Services, Inc., B-225469, Jan. 29, 1987, 87-1 CPD ¶ 97.

A contracting officer must make an affirmative determination of responsibility prior to awarding the contract. However, our Office does not review affirmative determinations of responsibility unless there has been a showing of fraud or bad faith on the part of procuring officials or that the solicitation contains definitive responsibility criteria which allegedly have not been applied. Aleman Food Service, Inc., B-223959, supra.

Here, the contracting officer found Devils Lake and Brunswick responsible and specifically indicated he determined both to be separate legal entities. The protester has not alleged bad faith or fraud here. Further, we cannot conclude that the RFP contains definitive responsibility criteria. Definitive responsibility criteria involve

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2/ The concept of responsiveness is not applicable directly here, since the procurement is negotiated. See, VA Venture St. Anthony Medical Center, Inc., B-222622, B-222622.2, Sept. 12, 1986, 86-2 CPD ¶ 289. In any event, matters of responsiveness pertain to an offeror's unequivocal promise to comply with a material requirement of the solicitation, while, as here, matters of an offeror's status or eligibility for award concern responsibility.

specific and objective standards of responsibility. See, e.g., True Machine Co., B-215885, Jan. 4, 1985, 85-1 CPD ¶ 18. The above RFP language merely concerns general legal status--it does not contain any specific standard to determine legal status. Accordingly, we will not review the contracting officer's affirmative determination of responsibility.

Brownell also claims that the contracting officer improperly relied on the SBA's determination that Devils Lake is a small business not under the control of Brunswick in determining Devils Lake's legal status for this procurement because the Army requested the SBA size determination prior to the issuance of this solicitation.

The record indicates that prior to issuing the RFP, questions were raised by Army officials concerning the relationship between Brunswick and Devils Lake. Also, since this is a defense mobilization procurement, the Army was aware of those firms, including Brunswick and Devils Lake, qualified to submit offers. The Army thus asked SBA for its opinion concerning the size status of Devils Lake, whose eligibility to participate in the 8(a) program had ended, to determine if Devils Lake was affiliated with Brunswick. The SBA concluded Devils Lake was a small business independently owned and operated and that Devils Lake's small business status was not affected by its management consulting agreement with Brunswick. The SBA also found that Brunswick's management did not dominate Devils Lake's management and that Devils Lake was under the control of the Sioux tribe which could, at anytime, terminate its management consulting agreement with Brunswick.

Initially, we do not think the contracting officer acted in bad faith or committed fraud in relying on this information in making his responsibility determination. Further, since Devils Lake is a small business, ultimately any determination of its responsibility would have had to be referred to the SBA. Under these circumstances, where the contracting officer was aware of Brunswick's and Devils Lake's prior relationship, and their eligibility as defense mobilization producers, we cannot conclude that it was unreasonable for the contracting officer to obtain what was in effect an advisory opinion that Devils Lake was an independently owned and controlled small business.

Brownell claims that any SBA decision concerning Devils Lake is biased because SBA has an interest in ensuring the success of Devils Lake. We do not find any evidence that SBA, in carrying out its statutory responsibility of making size determinations, was biased. Further, there is nothing to indicate that the contracting officer who made the

affirmative determination of responsibility was biased. In any event, the protester has the burden of proving bias on the part of contracting officials and we will not attribute unfair or prejudicial motives to them on the basis of inference or supposition. GTE Government Systems Corp., B-222587, Sept. 9, 1986, 86-2 CPD ¶ 276.

Brownell further alleges that Brunswick and Devils Lake engaged in unfair coordination of their pricing for this RFP. We view its allegation that these firms did not independently price their proposals as raising the issue of collusion. See Tri-Country Corrugated, Inc., B-220005, Aug. 30, 1985, 85-2 CPD ¶ 257; Informatics Inc., B-181642, Feb. 28, 1975, 75-1 CPD ¶ 121.

Initially, we note that the Army states it investigated this matter and found no evidence to suggest that Brownell's assertions were correct. In any event, probative evidence of collusion between offerors to gain a competitive advantage or prejudice the government or other offerors concerns a matter of responsibility. Tri-County Corrugated, Inc., B-220005, supra. As noted above, our Office will not consider a challenge to an affirmative determination of responsibility absent circumstances not shown to be present here. Further, since Devils Lake is a small business, any determination by a contracting officer that Devils Lake is nonresponsible would have to be referred to the SBA for consideration under its Certificate of Competency procedures. Oceanside Moving and Storage, B-218075.2, May 23, 1985, 85-1 CPD ¶ 591.

Brownell also contends amendment No. 0005, which accelerated delivery of government-furnished nets, unfairly benefited Teledyne, the incumbent contractor, which Brownell alleges would not have idle production time if delivery of the nets were accelerated. In the alternative, Brownell argues that, even if Teledyne was not benefited by accelerated delivery, only Brownell did not benefit from the amendment because it was the only offeror which required first article testing prior to commencing production. Therefore, Brownell states it could not use the accelerated delivery schedules.

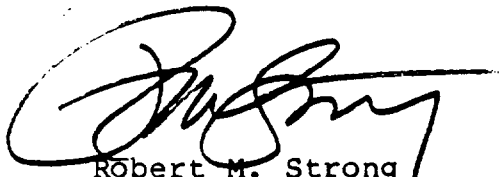
Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), require that protests based upon alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing date for receipt for proposals. Here, since Brownell did not protest this matter until after the closing date established by the amendment, its protest is untimely.

Brownell argues that we should consider its protest timely because it did not learn of Teledyne's production schedule until after contract award. However, the record indicates that Brownell, in fact, questioned the propriety of the amendment upon receiving it, but failed to protest at that time. Further, while Brownell alleges that accelerated delivery would benefit all offerors except for first time offerors such as Brownell, Brownell, at the time of amendment issuance, obviously was aware of its status as a first time offeror. Therefore, we consider Brownell's protest filed after the closing date (and only after Brownell learned that it was not awarded a contract) untimely.

Finally, Brownell protests other solicitation provisions including those provisions advising offerors that option prices would not be evaluated for award purposes and that prices requested for contractor furnished nets were for informational purposes only. Also, Brownell protests that the solicitation estimate of 90,000 camouflage screen units is inconsistent with an earlier estimate in a Commerce Business Daily notice announcing the Army's intent to procure the camouflage screens. These protest bases are also untimely since they were not filed prior to closing for receipt of proposals. 4 C.F.R. § 21.2(a)(1).

Brownell requests the costs of pursuing its protest and proposal preparation costs. Since Brownell's protest is dismissed, there is no decision on the merits and thus, no basis for award of costs. Systems Management American Corp., B-224229, Nov. 10, 1986, 86-2 CPD ¶ 546.

Brownell's protest is dismissed and the claim denied.



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